employer with notice of such operation, the court has gone farther than any previous case. There are many cases which at first glance seem to be in point, but upon examination they will be found to be cases in which the defects could have been discovered by inspection. In such cases there seems little question but that the defendant will be held liable when he either knew of the defects or could have discovered them. Here is the interesting and important feature of this case. The defect was not one that could be discovered and the court lays down the rule that although such defects could not have been ascertained, the fact that the machine's defective operation was generally known among the employees is sufficient to charge the defendant with knowledge of such defective operation and to render it liable for negligence in not warning a workman of such danger. While this is an extension of the doctrine of constructive notice with regard to machinery, upon the principles of evidence and by analogy it can be upheld. "The reputation of the place or machine and the fact that its dangerousness or the existence of the defect was reputed or generally talked about, would be relevant as showing the probable carrying of information by some one to the person charged; usually the question is one of constructive notice not an evidential one." WIGMORE, EVIDENCE, § 252. The case is analogous to those in which general reputation of a servant for incompetency, carelessness, etc., has been held to be constructive notice to an employer. *Cameron* v. *N. Y. C. & H. R. R. Co.*, 145 N. Y. 400, 40 N. E. 1; *Lambert* v. *Pfizer*, 49 App. Div. 82, 63 N. Y. Supp. 591; *Calumet Electric St. Ry. Co.* v. *Peters*, 88 Ill. App. 112; *Texas & P. Ry. Co.* v. *Johnson*, 35 S. W. 1042; *Monahan* v. *City of Worcester*, 150 Mass. 439, 23 N. E. 228. There is no reason why a machine cannot acquire a reputation as well as a person. The reason for extending the rule in the case of servants has seemed to be that it was impossible to ascertain from the physical characterisitics of a man what his competency was, while in the case of a machine defects of operation can usually be found out by inspection. Where, however, it becomes impossible to ascertain such defect by inspection, there is no reason why the same rule should not apply as does in the case of servants.

MASTER AND SERVANT—RAILWAY TRAIN MEN—FELLOW-SERVANTS—COMMON EMPLOYMENT.—Appellee, who was a brakeman on one of appellant's freight trains, while riding on the engine, was seriously injured in a head-on collision between the engine in which he was riding and one of appellant's work-trains. The work-train was on the main track on the time of the freight-train, and although the engineer of the work-train testified that he directed a brakeman to flag the freight and supposed he had done so, it developed that he had not, and the freight running at a high rate of speed, had no notice that the work-train was on the track until the engine was within a few feet of it, and when it was too late to stop or reduce the speed or avoid a collision. *Held*, that the engineer, conductor, and brakeman of the work-train were not fellow-servants of the brakeman of the freight-train and that the latter could recover from the company for his injury resulting from the negligence of the trainmen of the work-train. *Louisville & N. R. Co.* v. *Brown* (1908), — Ct. App. Ky. —, 106 S. W. Rep. 795.

This case is illustrative of the strict adherence of the Kentucky court to the highly artificial rule established by the more recent decisions in that state, i. e. that common employment depends solely on identity of departments of work. There are two theories as to what constitutes common employment. The first is that common employment depends solely on whether the delinquent servant's negligence was a risk contemplated by the injured servant when he entered into this employment; and the second is, that common employment depends on whether the two servants were working in the same department or not. The great majority of the courts have adopted the first theory and in these jurisdictions trainmen working on *different* trains have been held to be in the same common employment, and therefore fellow-servants. *Pittsburg, Ft. W. & C. R. Co.* v. *Ruby,* 38 Ind. 294; *Oakes* v. *Mase,* 165 U. S. 363; *Kerlin* v. *Chicago, P. & St. L. R. Co.,* 50 Fed. 185; *Pleasants* v. *Raleigh & A. Air-Line R. Co.,* 121 N. Car. 492; *Michigan C. R. Co.* v. *Dolan,* 32 Mich. 510; *Chicago, St. Louis & N. O. R. Co.* v. *Doyle,* 60 Miss. 977; *Denver & R. G. R. Co.* v. *Sipes,* 23 Colo. 226; *Norfolk & W. R. Co.* v. *Donnelly,* 88 Va. 853; *Healey* v. *New York, N. H. & H. R. R. Co.,* 20 R. I. 136; *Howard* v. *Denver & R. G. R. Co.,* 26 Fed. 837; *Randall* v. *Baltimore & O. R. Co.,* 109 U. S. 478; *Jenkins* v. *Richmond & D. R. Co.,* 39 S. C. 507. Only a few courts have adopted the second theory and perhaps none with such vigor and so unequivocally as those of Kentucky, especially in their later decisions. In the following cases the trainmen handling *different* trains were held *not* to be fellow-servants: *Chicago & Alton R. Co.* v. *House,* 172 Ill. 601; *Chicago City R. Co.* v. *Leach,* 80 Ill. App. 354. (But it is a mixed question of law and fact in Illinois and the relations of the servants to each other should be submitted to a jury under proper instructions.); *Maddus* v. *Chesapeake & Ohio R. Co.,* 28 W. Va. 610. In Kentucky the difference of department alone is sufficient to exclude the defense of common employment, and neither the degree of negligence nor the superiority of rank enter as a material factor, and so the cases, especially the later ones, have consistently held that trainmen on different trains are not fellow-servants. *Louisville C. & L. R. Co.* v. *Cavens* (1873), 9 Bush. 556; *Kentucky C. R. Co.* v. *Ackley* (1888), 87 Ky. 278; *L. & N. R. R. Co.* v. *Hiltner* (1900), 21 Ky. L. Rep. 1826. *The Cincinnati N. O. & T. P. R. Co.* v. *Roberts* (1901), 23 Ky. Law. Rep. 264; *Louisville & N. R. Co.* v. *Edmunds, Admr.* (1901), 23 Ky. Law Rep. 1049.

MORTGAGE.—"CONVEYANCE"—"ASSURANCE."—The defendant gave a first mortgage on his farm in October, which was not recorded until the 28th day of the following May. On the 21st of May, he gave a second mortgage, not reciting therein the former mortgage, which was duly recorded the following day. An indictment was brought under a statute making it a misdemeanor to execute any deed or writing conveying or assuring property which had been previously sold, conveyed, or mortgaged, such deed or writing being outstanding and in force, without describing or reciting such former deed or writing. *Held,* on a motion to quash that a mortgage is not a conveyance or assurance within the meaning of the statute. *State* v. *Rhodes* (1908), — Kan. —, 93 Pac. Rep. 610.